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No. 92-2027

Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN ROBERT WOODS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

Writ of Certiorari
to the United States Court
of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES,	)	
	)	Criminal No.
v.	)	84-184
	)	
JOHN ROBERT WOODS,	)	
Defendant,	)	

OPINION

ZIEGLER, District Judge.

Pending before the court is the motion of defendant, John Robert Woods, to correct an alleged illegal sentence pursuant to Fed. R. Crim. P. 35(a). Defendant pled guilty to two counts of a thirty-five count indictment charging mail fraud in violation of 18 U.S.C. § 1341, and bankruptcy fraud in violation of 18 U.S.C. § 15. The indictment alleged that from August 24, 1973 through June 13, 1980, Woods and his co-defendant, Anthony Pivirotto, engaged in a scheme to defraud investors of the Safeguard Investment Company.

This court sentenced Woods to a term of imprisonment of two years on Count 8 and five years on Count 13. The sentence on the latter was suspended and defendant was to be placed on probation for five years following his release from confinement. As a condition of probation, Woods was ordered to make restitution in the sum of $989,218.00. Restitution was the joint and several obligation of defendant and his co-defendant, Anthony Pivirotto.

Woods appealed, contending that "restitution could not be directed in any amount greater than that involved in the particular offense for which defendant was convicted, in this case Count 13." United States v. Woods, 775 F. 2d 82, 87 (3d Cir. 1985). Count 13 charged an unlawful mailing to "Sam and/or Elsie Fanelli" pursuant to a scheme to defraud

investors. Because the Fanellis lost only $4,758.47, Woods argued that the portion of the restitution order exceeding this amount, some $984,459.53, was illegal. The Court of Appeals for the Third Circuit rejected this argument and stated:

> It is the overall scheme that is central to all the counts and gives rise to the victims' financial loss. ... We find merit in this argument [offered by the government], and when viewed in conjunction with the consent of defendant, the case at hand falls within the reasoning adopted by the [Court of Appeals for the Ninth Circuit in] Phillips [679 F.2d 192 (1992)]. In the circumstances here, the district court had authority to direct restitution to the victims for the total remaining amount of loss caused by the defendants' illegal scheme, and therefore it did not abuse its discretion in making such an order.

Id at 88.

Defendant completed his prison sentence on October 2, 1986, and his five-year probationary term as to Count 13 on October 2, 1991. Defendant paid $457,338.00 of restitution to the Clerk of Court during the probationary period. In light of the Supreme Court's decision in Hughey v. United States, 495 U.S. 411 (1990), Woods filed the present motion which again challenges the legality of the restitution order and seeks a return of the alleged excess restitution from the United States, or a total of $452,579.53 ($457,338.00 - $4,758.47). For the reasons that follow, the motion will be denied.

In Hughey, the Supreme Court held that the Victim Witness and Protection Act of 1982 (VWPA), 18 U.S.C. §§ 3579-80

(1982 ed. & Supp. IV),[1] authorizes a sentencing court to order restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." Id at 413. The Court

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1. We note that the VWPA was recodified at 18 U.S.C. §§ 3663-64 by Pub.L. 98-473, 98 Stat. 2031, Oct. 12, 1984, effective Nov. 1, 1986 Section 3663(a) has been subsequently amended, the last occasion by Pub.L. 101-647, 104 Stat. 4863, 4931, effective Nov. 29, 1990), and currently provides in pertinent part:

> (1) The court, when sentencing a defendant...., may order, in addition to or...in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.
> (2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern.
> (3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

18 U.S.C.A. § 3663 (West Supp. 1991). Subsections (2) and (3) are post-Hughey additions to the VWPA.

interpreted the language of Section 3579(a) that a court may order "the defendant make restitution to any victim of such offense,"[2] as evidencing congressional intent to limit a sentencing judge's authority.

I. Retroactivity

As a threshold matter, we must determine whether Hughey should be applied retroactively. The United States and Woods disagree concerning the

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2. At the time of Hughey's sentencing, Section 3579(a), the predecessor of 3663(a) provided that the court may order a "defendant to make restitution to the victim of the offense." In 1986 Congress replaced "victim of the offense" with "victim of such offense." Pub.L. 99-646, 100 Stat. 3619. Although the change became effective after Hughey committed the offense but prior to his sentencing, the Supreme Court noted that this "change in language was not intended to alter the meaning of the provision." 495 U.S. at 411 n.1.

standard that governs our determination. The government contends that the Allen v. Hardy, 478 U.S. 255 (1986), and Griffith v. Kentucky, 479 U.S. 314 (1987) line of cases control. These decisions govern the determination whether a decision of the Supreme Court announcing a new constitutional rule of criminal procedure should be given retroactive effect. The gravamen of these cases is that such decisions will be given retroactive effect for defendants whose convictions are not yet final when the rule is announced,[3] and will not be given retroactive effect for defendants whose cases are pending on collateral review.

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3. A conviction is final when "a judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Griffith, 479 U.S. at 321 n.6. Defendant's conviction is clearly final under this standard.

Griffith, 479 U.S. at 328. See also Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.") (plurality opinion).[4]

Woods contends that Davis v. United States, 417 U.S. 333 (1974), governs our retroactivity determination. In Davis, the Court allowed a collateral attack on the basis of an intervening interpretation of a substantive criminal statute by a court of appeals. The decision did not, however, reach the

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4. At least one court of appeals, relying in part on Teague, has held that a defendant was not entitled to retroactive application of Hughey to challenge a special term of probation ordering restitution to all victims of a mail fraud scheme. See United States v. Bennett, 943 F.2d 738, 741 (7th Cir. 1991).

merits of the petition. The Court assumed petitioner's contention was correct to determine whether the intervening decision should be applied retroactively, that is, whether collateral attack was or was not foreclosed. The Supreme Court noted that if the petitioner's contention was well taken, that is, his "conviction and punishment [were] for an act that the law does not make criminal," the collateral attack should not be foreclosed. Id at 346.

The retroactivity issue with regard to Hughey does not fit neatly into the categories offered by the parties. While we find some merit to the government's position, we will, out of an abundance of caution and because we find that sentencing is more closely analogous to the substantive law, analyze the

retroactivity of Hughey under the Davis test. We note that one other district court has applied the Davis standard to determine the proper retroactive effect of an intervening decision regarding sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e). See United States v. Bermudez, 742 F.Supp. 556 (C.D. Cal. 1990) and 744 F. Supp. 216 (C.D. Cal. 1990).

Although we agree with Woods that Davis governs our analysis, it does not, as defendant assumes, require full retroactivity in all instances. In Davis, the Supreme Court noted that "the appropriate inquiry is whether the claimed error of law 'was a fundamental defect which inherently results in a complete miscarriage of justice.'" 417 U.S. at 346 (citation omitted). Full retroactivity to avoid a "miscarriage of

justice" such as conviction and incarceration for conduct that the law does not make criminal does not compel the same result under the present circumstances.

Assuming defendant's contention that this court imposed an illegal sentence under Hughey is correct, we do not believe that such error was of a "fundamental character." Woods equates the imposition of a criminal sentence without statutory authority to a conviction and punishment for conduct which the law does not make criminal. Thus, defendant contends that Davis requires the full retroactive effect of Hughey.

In Osser v. United States, 864 F.2d 1056 (3d Cir. 1988), the Court of Appeals considered a petition for a writ of coram nobis to vacate a 1973 conviction of mail

fraud on the basis of the intervening decision of McNally v. United States, 483 U.S. 417 (1987). McNally held that the federal mail fraud statute did not reach schemes to deny the public its right to have government officials perform their duties honestly and impartially. The Court of Appeals noted that while "an assertion that a conviction was based on conduct not covered by a criminal statute class is of a 'fundamental character,' . . . [t]he interest in finality in judgment is a weighty one that may not be casually disregarded.

Where sentences have been served, the finality concept is of an overriding nature, more so that in other forms of collateral review such as habeas corpus, where continuance of confinement could be manifestly unjust." Osser, 864 F.2d at 1059 (citing Davis, 417 U.S. at 346-47.

In this regard, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with the end to litigation." Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J. dissenting). Such is the case here -- defendant's conviction and the probationary period under which the restitution was imposed by this court ended on October 2, 1991.

Moreover, we find that no miscarriage of justice has taken place regarding the sentence imposed on defendant. This court and the Probation Office went to great lengths to arrive at a fair and just sentence. There was, and continues to be, no question concerning the total loss suffered by the victims of defendants' fraudulent scheme. Although his plea to count 13 does not

itself formally admit to this total loss, our review of the colloquies with Woods confirms his acknowledgement to this amount. We also consider the government's reliance, as well as that of the numerous victims to whom the restitution has been distributed, on the Court of Appeals' affirmance of the judgment of sentence almost five years prior to Hughey to support our conclusion that it should not be applied retroactively. Lastly, we note that the VWPA was amended after Hughey to authorize a sentencing court to order restitution "to any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern." See supra n.1. For these reasons, we hold that retroactive application of Hughey is unwarranted.

II. Application of Hughey

Even if Hughey is applied retroactively, it does not control the determination whether the restitution imposed by this Court was illegal. First, the holding in Hughey concerned the legality of restitution imposed under the authority of the Victim Witness Protection Act of 1982 (VWPA), 18 U.S.C. §§ 3579-80 (1982 ed. & Supp. IV). The restitution at issue here, however, was imposed as a special condition of probation under the authority of Federal Probation Act (FPA), 18 U.S.C. § 3561.[5]

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[5]. The FPA provided in pertinent part:

> While on probation and among the conditions thereof, the defendant - May be required to make restitution or reparation to the aggrieved parties for actual damages or loss caused by the offense for which conviction was had....

See Woods, 775 F.2d at 87 n.1. (VWPA not yet in effect when defendant sentenced) and presentence Report of the U.S. Probation Office at 7 (restitution a possible condition of probation using Title 18, U.S. Code, Section 3651). Because the Supreme Court's holding specifically dealt with the language of the VWPA, not the FPA, it is not controlling here. See United States v. Duvall, 926 F.2d 875, 876-77 (9th Cir. 1991).

Woods argues that because "Federal Probation Act is narrower than the VWPA . . . the restitution order in the instant case is illegal and must be vacated." (citing United States v. Kress, 944 F.2d 155, 158 (3d Cir. 1991).[6] We read the statement in Kress, which refers to the

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18 U.S.C. § 3651.

6. Defendant's Reply Brief at 9.

broad provisions of the VWPA and the repeal of the FPA, as addressing the comprehensive framework of the VWPA and possibly the authority of a sentencing judge to impose restitution in addition to or in lieu of other penalties. Although restitution under the FPA may have been narrower in the sense that it could be imposed only as a condition of probation, it should be noted that the FPA was in effect during the pre-Sentencing Guideline era when federal judges had far broader discretion to determine an appropriate sentence. Thus, we question whether the limitations placed on a judge's authority to impose restitution under the VWPA apply to his or her authority under the FPA.

Even if the reasoning and holding of Hughey mandates that we interpret Section 3651 to contain a similar restriction on

restitution ordered under the FPA generally, we hold that Hughey, when specifically applied to a conviction for an offense such as mail fraud, does not invalidate the restitution imposed by this court. The FPA provided:

> While on probation and among the conditions thereof, the defendant -
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had....

18 U.S.C. § 3651. In other words, we do not interpret this language to foreclose the restitution ordered as a condition of Woods' probation. We agree with the following analysis:

> After Hughey, the appropriate focus is on the conduct that forms the basis for the offense. In order to obtain a conviction of mail fraud, the government must prove that the defendant engaged in a 'scheme to defraud.' The scheme

> alleged in the [indictment] and plea in the present case demonstrated a pattern of conduct . . . Because a scheme to defraud is an element of the offense of mail fraud, a conviction pursuant to that statute allows restitution for all victims of that scheme.

United States v. Bennett, 943 F.2d 738, 740 (7th Cir. 1991) (emphasis added). We find this reasoning persuasive concerning the extent of restitution permitted under both the VWPA, as was the case in Bennett and the FPA.

The Court of Appeals further noted:

> Not all convictions involving fraud would allow such extensive restitution. For instance, in Hughey the government was required to prove an intent to defraud in convicting Hughey of the unauthorized use of credit cars. The offense did not, however, require proof of a scheme to defraud, and thus, the evidence of other credit card thefts was not conduct forming the basis of the conviction,

Id at 740 n.1. The Court of Appeals for the Seventh Circuit distinguished the plea to mail fraud in that case from that in Hughey where the defendant was charged with three counts of theft by a U.S. Postal Service employee and three counts of unauthorized use of credit cards and the guilty plea to only one count of the latter. We agree with the reasoning of Bennett that the discrete, isolated offenses in Hughey, even if its interpretive method generally placed a restriction on restitution pursuant to the FPA as Woods contends, render the holding inapplicable when the specific offense to which a defendant pleads guilty is mail fraud and is ordered to make restitution to all the victims.[7]

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[7]. We note that all of the circuits are not in agreement. See e.g., United Stone, 948 F.2d 700 (11th Cir. 1991).

Woods argues that recent decisions by the Court of Appeals for the Third Circuit support his position concerning the scope of Hughey. For example, the Court of Appeals noted: "Thus, where, as here, a defendant is charged in a multi-count indictment, any award of restitution must be based on losses to the victim that were caused by the counts of which the defendant was convicted or to which he plead guilty." United States v. Badaracco, No. 91-5484, slip op. at 32 (3d Cir. Jan 24, 1992) (as amended Feb. 5, Feb. 24, and March 3, 1992). We conclude that this decision offers no support for such a broad reading of Hughey.

In Badaracco, the Court of Appeals reviewed several sentencing issues including "whether the district court erred in ordering Badaracco to make

restitution to the Elysian Savings Bank in the amount of $293,000.00." Id., slip op. at 2. Badaracco, the president and chief executive officer of the Elysian Federal Savings Bank of Hoboken, New Jersey, was charged with five counts of bribery in violation of 18 U.S.C.A. § 215 (West Supp. 1991), and five counts of bank fraud in violation of 18 U.S.C.A. § 1006 (West Supp. 1991) and 18 U.S.C. § 2 (1988). Badaracco pled guilty to four counts of bank fraud. Section 1006 provided in pertinent part that:

> Whoever, being an officer...[of] and lending, mortgage, insurance, credit, or savings and loan corporation of association authorized or acting under the laws of the United States...with intent to defraud any such institution...participates or shares or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan commission, contract, or any

> other act of any such corporation, institution, or association, shall be fin[e]d(sic) not more than $10,000 or imprisoned not more than five years, or both

18 U.S.C. § 1006 (1988). The counts to which Badaracco was "convicted covered the Crystal Condos project (Counts 2 and 4), the Adams Street project (count 6) and the Fourteenth Street project (Count 10)." Badaracco, slip op. at 8. In essence, these counts of the indictment charged that "Badaracco approved loans to several Hoboken developers on the condition that they distribute the electrical work to one or more of the three Badaracco [electrical] companies." Id, slip op. at 3.

Although the Court offhandedly referred to the individual projects as the "second Badaracco scheme'" Id. slip op. at 6, and the "Crystal Condos scheme," Id., slip op. at 8, we note that

proof of a scheme was not, and is not, required for a conviction under Section 1006. Moreover, Badaracco successfully appealed "the district court's order that he pay $293,000 in restitution to Elysian, arguing that restitution was improper because Elysian did not suffer any loss from [his] crimes." Id., slip op. at 31. The district court totalled the dollar value of the four electrical contracts awarded to the Badaracco family businesses to reach the restitution figure of $293,000.

The Court of Appeals held that this was error and noted:

> Although we have held supra that gross gain is a valid measure for of the loss attributable to this offense for purposes of guideline sentencing, a restitution order, in contrast, must be limited to the amount of [the bank's] loss as a result of Badaracco's fraud.

Id., slip op. at 33. Therefore, a remand was ordered to recalculate the bank's losses from the loans that it made to the contractors. The Court of Appeals did not vacate the restitution order because it included losses to victims of offenses for which Badaracco did not stand convicted. See Id., slip op. 33-34 n.16. The district court considered only the four bank fraud offenses to which Badaracco pled guilty; it erred only in its calculation of one victim's losses as a result of the specific conduct in those counts. Thus, Badaracco does not support Woods' contention.

Woods also points to a comment in United States v. Furst (Furst (II)), 918 F.2d 400 (3rd Cir. 1990), where the Court of Appeals stated:

> [T]he Supreme Court rejected the decisions of a number of courts of appeal that had permitted restitution in the

> full amount of the loss caused by a unified scheme so long as a single conviction arose out of the scheme.

Id. at 409-10 (citing Hughey). In this decision, the Court of Appeals was concerned with the propriety of a restitution order where the defendant was convicted of three counts of making a false statement in violation of 18 U.S.C. § 1005,[8] and two counts of making a false statement in ERISA records in

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[8]. Section 1005 provides in pertinent part:

> Whoever makes any false entry in any book, report, or statement of [any subject bank]with intent to injure or defraud such bank, or other company, body politic or corporate [is guilty of a crime].

18 U.S.C. § 1005. See also Furst (I), 886 F.2d 558, 567 (3d Cir. 1989)

violation of 18 U.S.C. § 1027.[9] Id. at 402.

Again, we find it significant that proof of a scheme to defraud was not necessary for any of those convictions. Moreover, the Court of Appeals remanded for resentencing because "the district court awarded partial restitution without stating on the record the total amount of restitution that it had the power to

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9. Section 1027 provides in pertinent part:

> Whoever, in any document required by title I of [ERISA] .... to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be certified [is guilty of a crime].

18 U.S.C. §1027. See also Furst (I), 886 F.2d 558, 568 (3d Cir. 1989).

impose, expressly identifying who Furst victimized or explaining how the amount of partial restitution was caused by the false statements for which Furst remained convicted." Id. at 410. Thus, we consider the comment concerning the breadth of Hughey in block quotes above to be dicta and otherwise not controlling for the reasons set forth in our discussion of Bennett.

In sum, we hold that Robert Woods is not entitled to retroactive application of Hughey. We also hold that Hughey is inapplicable to restitution imposed under the authority of the Federal Probation Act before its repeal. Alternatively, even if Hughey applies generally to restitution under the FPA, we hold that the distinction made by several courts of appeal, including in United States v. Woods, 775 F.2d at 88, for restitution

for a mail fraud conviction, renders Hughey inapplicable and was not overruled in either Badaracco or Furst (II). The motion shall be denied.

A written order will follow.

DATED: April 1, 1992

Donald E. Ziegler
United States District Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES,	)	
	)	Criminal No.
v.	)	84-184
	)	
JOHN ROBERT WOODS,	)	
Defendant,	)	

AND NOW, this 1st day of April, 1992, after consideration of the submissions of the parties,

IT IS ORDERED that the motion of defendant, John Robert Woods, to correct an illegal sentence, pursuant to Federal Rule of Criminal Procedure 35(a), be and is hereby denied.

Donald E. Ziegler
United States District Judge

cc: Counsel of record

Filed February 22, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3207

UNITED STATES OF AMERICA,

Appellee

v.

ANTHONY J. PIVOROTTO
JOHN ROBERT WOODS,

JOHN ROBERT WOODS,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. CRIMINAL NO. 84-00184)

Argued: October 27, 1992

Before BECKER, NYGAARD and
HIGGINBOTHAM, Circuit Judges,
(Filed: February 22, 1993)

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OPINION OF THE COURT

BECKER, Circuit Judge.

In Hughey v. United States, 495 U.S. 411, 110 S. Ct. 1979 (1990), the Supreme Court held that under the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3579, 3580 (recodified at 18 U.S.C. §§ 3663, 3664 as of November 1, 1987) ("VWPA"), courts have the authority to order restitution only for the offense of conviction. This appeal requires us to decide whether this rule retroactively applies to a pre-Hughey restitution order

authorized under the Federal Probation Act, 18 U.S.C. § 3651 (repealed, effective November 1, 1987) ("FPA"), which has already been paid in full by the defendant.

The defendant-appellant, John Robert Woods, was convicted of defrauding numerous investors in a mail fraud scheme. Woods argues that the restitution order on the counts for which he was not convicted are illegal under Hughey, and that his sentence therefore should be invalidated under Rule 35, Fed. R. Crim. P. Woods contends that Hughey should be retroactively applied to him, and that, so applied, the portion of his restitution order that did not stem from the offenses for which he was convicted ($452,579.53) should be set aside as unauthorized by the FPA. He seeks repayment of that sum by the government,

even though the government received the money only as a conduit for the victims whose losses Woods has not denied causing.

We conclude that Hughey should not be retroactively applied to Woods in his Rule 35(a) motion. The question of Hughey's retroactivity does not fit neatly under either the substantive standard for determining retroactivity, see Davis v. United States, 417 U.S. 333, 94 S. Ct. 2298 (1974), or the procedural standard, see Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality opinion). However, both standards reflect the rule that courts will not ordinarily apply new decisions of criminal law retroactively without substantial justification. We glean from Teague and Davis that we should apply Hughey retroactively only if Woods

demonstrates that to do otherwise would result in a serious miscarriage of justice. Because we conclude that Woods has not made this showing we will affirm the district court order denying Woods' Rule 35(a) motion.

I. FACTS AND PROCEDURAL HISTORY

On October 17, 1984 a grand jury returned a 35-count indictment that charged Woods and his co-defendant Anthony Pivorotto, with mail fraud and bankruptcy fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 152. The indictment alleged that from August 24, 1973 through June 13, 1980, Pivorotto and Woods engaged in a scheme to defraud the investors of the Safeguard Investment Company, which they jointly managed. The indictment charged that as a result of

the fraudulent scheme, "approximately 234 investors who had deposited, reinvested and maintained moneys and funds in Safeguard . . . were defrauded of approximately $3,278,673."[1]

On January 29, 1985, Woods pled

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[1]. The details of the scheme are set forth in our previous opinion which addressed Woods' restitution order under the law as understood prior to Hughey. See United States v. Woods, 775 F.2d 82 (3d Cir. 1985) (Woods I). Briefly summarized, Safeguard solicited money from investors for the avowed purpose of making residential mortgage loans. However, in August of 1973 Safeguard stopped making mortgage loans to the general public and instead began to make "unsecured loans" of over one million dollars to Woods and Pivirotto and to businesses they controlled. Therefore, rather than promote mortgage loans, Safeguard effectively gave the investors' money to Pivirotto and Woods - although some money was also used to pay some interest on deposits held by Safeguard. In addition, Safeguard misrepresented to investors that their deposits were federally insured. It also misled investors into thinking that the company was licensed as a banking institution by the Department of Banking of Pennsylvania. In May, 1980, Safeguard filed a petition in bankruptcy under Chapter 11.

guilty to Counts 8 and 13 of the indictment, which charged him with using the mails in a scheme to defraud. In exchange, the government dismissed the remaining 33 counts. Through this plea agreement, Woods pled guilty to the fraud of only two investors, Sam and/or Elsie Fanelli. The plea agreement neither recommended a specific sentence nor referred to the possible imposition of a restitution order.

Before accepting the plea, the district court engaged in a lengthy Rule 11 colloquy in which it informed Woods and Pivorotto of its intention to require them to pay restitution to the victims of their crimes. Toward this end, the court requested Woods and Pivirotto to provide the Probation Office with detailed financial statements, sworn to under oath. Because there was a strong

argument that the defendants' assets were primarily the result of the fraudulent scheme, the court placed the burden on Woods and Pivorotto to separate their legally and illegally acquired holdings. The court also asked the Probation Office, in consultation with the U.S. Attorney's Office, to use these statements in compiling a presentence report that detailed the claims of the Safeguard investors and the current assets of Woods and Pivorotto. Specifically, the presentence report was to contain the Probation Office's determination of the amount of the original deposits made by Safeguard investors as well as the amount of interest owed to the investors.

At a sentencing hearing held four months later, the district court reviewed the presentence report in depth and heard

testimony from several witnesses for the defense. The court concluded that the Safeguard investors had suffered a $1.8 million loss of principal. That figure represented the principal of the investor's deposits, minus the withdrawals made from the funds, minus the interest the investors would have earned on the funds, and minus the money already disbursed to the investors by Safeguard's trustee in bankruptcy.

The district court imposed on Woods and Pivorotto a joint restitution obligation of $989,218, of which Woods was required to pay $457,338. The court arrived at this figure after analyzing the presentence report and taking into consideration the defendant's ability to repay the Safeguard investors. This restitution order reflected only the amount of principal the court determined

that Pivorotto and Woods owed the defrauded investors of Safeguard and, as mentioned above, excluded the interest owed to the investors. The district court also sentenced Woods to two years of imprisonment on count 8 of the indictment and five years on count 13. However, the court suspended the latter sentence in favor of five years of probation, conditioned on the payment of the restitution order pursuant to the FPA 18 U.S.C. § 3651.

Woods appealed the restitution order, which this court affirmed in United States v. Woods, 775 F.2d 82 (3d Cir. 1985) (Woods I). Rejecting Woods' challenge, we held that the restitution order was proper even though it represented the victims' losses from the entire scheme and not just the counts to

which Woods had pled guilty.[2] Woods had pled guilty to acts in furtherance of a unitary scheme to defraud and we reasoned that where the offense is a scheme to defraud, each count of mail fraud was simply an act in furtherance of the scheme and hence the district court had the authority to direct restitution for the entire scheme, Id at 87-88.

In May of 1990, the Supreme Court decided Hughey v. United States, which vacated a restitution order imposed pursuant to the VWPA, 18 U.S.C. § 3579(a)(1) (1982 ed. and Supp. IV). In Hughey, a grand jury had indicted the

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2. We also held that the district court had not violated the requirements of Rule 11(c)(4), Fed. R. Crim. P. (rejection of a plea agreement). We held that even though the plea agreement had not mentioned that restitution could be imposed, the court had told Woods in unequivocal terms that he would be required to pay restitution and had given him sufficient opportunity to withdraw his plea. See 775 F.2d at 85-86.

defendant for three counts of theft by a Postal employee and three counts of use of an unauthorized credit card. Although Hughey pled guilty to only one count of each offense in return for the dismissal of the remaining counts, the district court ordered restitution for the losses stemming from the other credit cards Hughey was alleged to have stolen in the indictment. The Supreme Court held that this restitution order violated the language of the VWPA, which provided that a defendant convicted of any offense" may be ordered to "make restitution to any victim of such offense" 18 U.S.C. § 3579(a)(1). Applying basic principles of statutory construction, the Court concluded that the language of the VWPA authorized restitution only for losses stemming from the offenses for which Hughey had been convicted and not the

dismissed charges.

By 1990, when the Court decided Hughey, Woods had already served his two-year prison sentence on count 8, had fully paid his portion of the $989,218 restitution order - which totalled $457,338[3] - and had served slightly more than two years of his five year period of probation.[4] In January, 1992, relying on Hughey, Woods filed a motion pursuant to Fed. R. Crim. P. 35(a) to vacate the portion of the restitution order which exceeded $4,758.47, the amount of loss underlying count 13, the mail fraud count for which he was convicted and for which

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3. At argument, the government informed us that approximately $23,000 remains undistributed because of difficulties the Probation Office encountered in locating all the defrauded investors in the Safeguard Investment Company.

4. Woods completed his probationary period on October 2, 1991.

he received probation. Woods sought the repayment of $452,579.53 the alleged excess restitution ($457,338.00 minus $4,758.47).

In April, 1992, the district court entered an order denying Woods' Rule 35(a) motion. The court concluded that Hughey should not be retroactively applied to Woods' sentence. In the alternative, the court found that even if Hughey were retroactively applied, it was not controlling because (1) Hughey concerned the proper interpretation of the VWPA, not the FPA under which Woods was sentenced; and (2) even if Hughey restricted restitution orders pursuant to the FPA, it did not apply when the defendant was someone who, like Woods, had been convicted of crime that required proof of a "unitary scheme" to defraud.

This appeal followed. We have

jurisdiction pursuant to 28 U.S.C. § 1291. Our review of the district court's denial of the Rule 35(a) motion is plenary "since the legality of the sentence imposed by the district court is being challenged." United States v. Kress, 944 F.2d 155, 158 (3d Cir. 1991), cert. denied, 112 S. Ct. 1163 (1992). We note that under Rule 35(a). Woods bears the burden of proving the illegality of his sentence. See Mark S. Rhodes, 5 Orfield's Criminal Procedure Under the Federal Rules § 35.15, at 433-34 (2d ed. 1987).[5]

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[5]. The parties have raised a number of issues that we do not reach because of our conclusion that Hughey should not be retroactively applied to Woods.

Woods asserts that although in Hughey the Supreme Court struck down a restitutionary obligation issued pursuant to the VWPA, Hughey's holding applies to restitution orders under the FPA as well. The government responds that Hughey's holding is limited to VWPA and does not apply to restitution orders under the FPA.

The government argues, in the alternative, that Hughey does not apply to restitution orders imposed on defendants who, like Woods, were convicted of a crime that required proof that it was part of a "unified" or "unitary scheme." However, subsequent to the district court's opinion and the submission of briefs on appeal, we have, in a VWPA case, rejected the argument that there is a "unitary scheme" exception to Hughey's holding. See United States v. Seligsohn, Nos. 91-2038, 91-2093, 92-1038, 91-2100 (3d Cir. filed Dec. 9, 1992), slip op. at 7.

The government further contends that Woods' consent before the district court to the restitution order serves to validate it. Woods responds that if Congress has not provided the Court authority to order a restitutionary sum, a defendant's consent cannot supply it.

In addition, the government argues that should we hold Hughey retroactive and find the restitution order overbroad, we should remand Woods' case to the district court for resentencing. The government argues that if we vacate part of the restitution order, the district court would have the authority to resentence Woods to a term of imprisonment up to the statutory maximum in prison for his convictions and that this act would not offend the Double Jeopardy Clause. Woods responds that Rule 35(a) does not grant the district court this resentencing authority and that such resentencing would violate Double Jeopardy.

II. DISCUSSION

A. Contentions of the Parties

Woods contends that, although in Hughey the Court invalidated a restitution order under the VWPA, the Court's reasoning applies equally to restitution orders under the FPA. Woods asserts that under the FPA the district court had no authority to order restitution for offenses of which he was never convicted. Accordingly, Woods submits that to the extent that the restitution order exceeded the $4,758.47

Finally, the government contends that sovereign immunity prevents Woods from recovering money from the government. See infra note 23 (discussing the sovereign immunity and Tucker Act issues).

he owed the Fanelli couple, it was illegal within the meaning of Rule 35. See infra n.7. The government responds that the restitution order should stand because Hughey applies only to the VWPA and not the FPA.

However, as both Woods and the government recognize, before we can reach the proper interpretation of Hughey, we must independently determine whether Hughey should be retroactively applied to Woods' Rule 35 motion.[6] Woods argues

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[6]. In treating retroactivity as a threshold question, we follow the Supreme Court's approach in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989) (plurality opinion), which treated retroactivity as a dispositive, threshold question. We also track our approach in United States v. Osser, 864 F.2d 1056, 1058 (3d Cir. 1988), in which we addressed the retroactivity issue first. But see United States v. Bennett, 943 F.2d 738, 741 (7th Cir. 1991), cert. denied, 112 S.Ct. 2970 (1992) (analyzing Hughey's retroactivity after addressing the substance of the defendant's argument).

that because his Rule 35 motion is a part of the original case rather than a collateral attack, an intervening change of law, such as Hughey, should be retroactively applied. In the alternative, Woods contends that even if we utilize the retroactivity analysis appropriate to collateral challenges, we should hold Hughey retroactive here. Specifically, Woods asserts that for retroactivity purposes we should treat Hughey as a new substantive, rather than a procedural, rule and should hold that Woods was subjected to a sufficiently substantial injustice to warrant Hughey's retroactive application. The government responds that we should apply the retroactivity analysis appropriate for new rules of criminal procedure, and that under this doctrinal rubric, Hughey may nor be retroactively applied.

B. Procedural Posture of Woods' Suit: Retroactivity under Rule 35(a)

Because the events giving rise to his conviction occurred before November 1, 1987, Woods proceeds under old Rule 35(a), which authorizes the court to correct an illegal sentence at any time.[7] However we reject Woods'

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7. Offenses committed prior to November 1, 1987 are governed by the former version of Rule 35, which provided that:

> (a) Correction of Sentence. The court may correct an illegal sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the

contention that under Rule 35, intervening changes in law are automatically retroactively applied.[8] Our legal system has a strong interest in

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> appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under the subdivision.

Rule 35, Fed. R. Crim. P. (1982). This provision was changed by amendment in 1986. Pub.L. 98-473, Title II, § 215(b), 98 Stat. 2015.

[8]. In our analysis of the retroactivity of Hughey to Woods' motion, we assume without deciding that, should Hughey be retroactively applied here, it would apply to Woods' restitution order even though it was imposed pursuant to the FPA rather than the VWPA, the statute at issue in Hughey. Cf. Davis v. United States, 417 U.S. 333, 342 & n. 12, 94 S.Ct. 2293, 2404 & n.12 (1974) (accepting, for retroactivity analysis, defendant's assertion that new criminal decision was correctly decided and relevant to his conviction).

the finality of adjudication. Accordingly, we do not apply new judicial decisions retroactively without substantial justification. For example, in civil adjudication, the general rule under Fed. R. Civ. P. 60(b) is that a judgment will not be disturbed despite a change in the law. See generally 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2864, at 223 (1973). In criminal adjudication as well, dating back to the Court's decision in Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965), there has been a trend, albeit one with many twists and turns, toward limitations on retroactive application of new criminal rules.[9]

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[9]. We note that the approach espoused in Linkletter v. Walker was discredited by a plurality of the Court in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989) (plurality opinion), a decision which further restricted the retroactive application of new rules of

This background interest in finality should not be ignored simply because a case arises under Rule 35. As the Fifth Circuit has aptly explained:

> The fact that a motion under rule 35 is one "made in the original case," does not, of course, mean that all of the judgments rendered at the original sentencing proceeding are automatically reopened upon the making of such a motion. That . . . would fly in the face of the notions of finality that are so basic in our judicial system. Rule 35 was not designed as a vehicle to reopen final judgments long since past ripe for review.

United States v. Henry, 709 F.2d 298, 314 n.23 (5th Cir. 1983) (citing Heflin v. United States, 358 U.S. 415, 79 S. Ct. 451 (1959)). In addition, as we explain below, see infra page 30, the interest in finality is heightened when a sentence has been completed, the situation in the instant case. See United States v.

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criminal procedure on collateral review.

Osser, 864 F.2d 1056, 1059 (3d Cir. 1988).

The plain language of Rule 35(a), which simply states that a court "may correct an illegal sentence at any time" does not speak directly to the retroactivity issue. However, the use of the word "may" in the rule indicates that courts are free to apply reasonable and prudential limitations on the correction of illegal sentences. Rule 35's permissive rather than mandatory language therefore suggests that sound restrictions on the retroactive application of new rules of law are appropriate.

We note that the legislative history of rule 35 reveals nothing to the contrary. Rule 35 was first promulgated in 1946 pursuant to the Act of March 8, 1934, ch. 49, 48 Stat. 399 (current

version at 18 U.S.C. § 3772). The Advisory Committee Notes to the rule explain only that the rule was intended to "continue[] existing [decisional] law." They do not in any way address a court's power, when applying Rule 35 to apply new criminal rules retrospectively.[10]

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[10]. Moreover we do not read Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451 (1959), which Woods has cited, to require us automatically to apply new decisions retroactively in Rule 35 motions. Treating the defendant's case as a Rule 35(a) motion, the Court in Heflin, pursuant to its decision in Prince v. United States, 352 U.S. 322, 77 S.Ct. 408 (1957), invalidated the defendant's sentence under both 18 U.S.C. § 2113(c) and (d) because it punished him for both the felonious taking and receipt of stolen property, which the Court had found unauthorized in Prince. Although the Court in Heflin applied Prince retroactively, it did so without discussion. To the extent Heflin may have ever stood for the retroactive application of new decisions in Rule 35(a) motions, that interpretation is no longer authoritative in light of the Court's subsequent jurisprudence.

In contrast to current retroactivity doctrine, when Heflin was decided the

Finally, the lack of a limitation on when a Rule 35(a) motion may be brought suggests that courts should impose some restriction on the retroactive application of new judicial decisions in order to place reasonable limitations on the reopening of

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Court typically, and without discussion, applied new criminal judicial decisions retroactively. See Linkletter v. Walker, 381 U.S. 618, 628, 85 S.Ct. 1731, 1737 (1965) ("It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule"); accord Robinson v. Neil, 409 U.S. 505, 507 (1973). See generally William J. Sheils, Note, Nonretroactivity in Habeas Corpus, 24 Suffolk U.L. Rev. 743 (discussing Supreme Court's approach to retroactivity of constitutional decisions pre-Linkletter). The Court handed down Heflin prior to its landmark decision in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965), in which the Court began a trend which has developed over the last thirty years toward greater restrictions on retroactivity in criminal adjudication. In fact, Heflin merely reflects the fact that there is no unique retroactivity analysis appropriate for Rule 35(a). Rather, courts should apply the rules that govern retroactivity generally.

sentences. Cf. United States v. Katzin, 824 F.2d 234, 241 (3d Cir. 1987) (because no time requirement limits jurisdiction under Rule 35 or 28 U.S.C. § 2255 "courts have invoked them only to correct 'fundamental' errors") (citing Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 471 (1962)).

C. The Appropriate Standard for Retroactivity

The first step in determining the appropriate standard for retroactivity in this hybrid case is to locate the correct source of authority. We find helpful the retroactivity jurisprudence that has been developed in coram nobis and §§ 2254 and 2255 actions.[11] As the Fifth Circuit

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11. As will appear, our retroactivity discussion resorts far more to the §§ 2254 and 2255 retroactivity

has observed "[c]oncerns that the Supreme Court has expressed about the scope of section 2255 may . . . inform our judgment about rule 35." United States v. Henry, 709 F.2d 298, 313 (5th Cir. 1983).

Rule 35(a) is functionally similar to both coram nobis and 18 U.S.C. §§ 2254 and 2255.[12] There are differences, of course. For a defendant to bring an action under §§ 2254 and 2255, he or she must be in custody. To utilize coram nobis, the defendant must have completely served the sentence. See 3 Wayne R. LaFave & Jerold H. Israel, Criminal

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jurisprudence that to that of coram nobis because of the paucity of coram nobis decisions.

[12]. For a more detailed discussion of Rule 35, writs of error coram nobis, and habeas corpus, see Mark S. Rhodes, Orfield's Criminal Procedure Under the Federal Rules § 35.13, at 429-30 (2d ed. 1987)

Procedure § 27.10 at 404 (1984). Rule 35(a), in contrast, imposes no limitations on when a defendant can bring a motion to correct an illegal sentence. Rule 35, Fed. R. Crim. P. In addition, Rule 35(a) allows a defendant only to challenge the legality of the sentence, and not the conviction. See Hill v. United States, 368 U.S. 424, 430, 82 S. Ct. 468, 472 (1962). But notwithstanding these differences, habeas corpus and coram nobis, like Rule 35(a), serve as exceptions to the principle of finality: each serves as a procedural device enabling defendants to relitigate previously decided issues. See United States v. Henry, 709 F.2d 298, 313 (5th Cir. 1983). See also Hill, 368 U.S. at 430, 82 S. Ct. at 472 (construing a motion under Rule 35). Hence we draw instruction from the retroactivity

jurisprudence developed under §§ 2254 and 2255 and coram nobis.

Under §§ 2254 and 2255, the Supreme Court has created separate retroactivity standards for new rules of criminal procedure and new decisions of substantive criminal law.[13] In Davis v. United States, 417 U.S. 333, 94 S. Ct. 2298 (1974), the Court articulated the appropriate standard for evaluating the retroactivity of new substantive criminal

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13. The Court first established this analytic distinction in Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876 (1973). There the Court held retroactive its decision in Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184 (1970), which prohibited prosecution of a defendant by both the municipality and the state for the same crime on double jeopardy grounds. The Court declined to analyze Waller's retroactivity under the extant procedural retroactivity standard, that of Linkletter, explaining that "[g]uarantees that do not relate to . . . procedural rules cannot, for retroactivity purposes, to be lumped conveniently together in terms of analysis." Id. at 508, 93 S.Ct. at 878.

decisions under § 2255. There the defendant's conviction, although already affirmed by the Ninth Circuit, was called into question by a new Ninth Circuit decision on nearly identical facts. Addressing the retroactivity of the new decision, the Supreme Court held that, "the appropriate inquiry [is] whether the claimed error of law was a 'fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t presents exceptional circumstances where the need for the remedy afforded'" by collateral relief is apparent. Id. at 346, 94 S. Ct. at 2305 (quoting Hill v. United States, 368 U.S. 425, 428, 82 S. Ct. 468, 471 (1962)). The Court held that the situation presented by Davis - in which the defendant may have been convicted for acts that were not considered criminal

under the relevant statute - satisfied this standard. It concluded that the injustice that would occur but for the retroactive application of the new Ninth Circuit decision was sufficiently egregious to warrant retroactivity.

In contrast to the substantive retroactivity standard established in Davis, the Court has recently revisited retroactivity doctrine for new rules of criminal procedure raised in habeas corpus suits. In Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality opinion), the Court discarded the Linkletter balancing test and announced a general rule that new criminal procedural rules would be non-retroactive in habeas corpus suits.[14]

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14. This is in contrast to the retroactivity rule on direct appeal. See Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987), (new decisions will be retroactively applied to all defendants

The Court identified two narrow exceptions to this rule of non-retroactivity. First, a court should apply a new criminal procedural rule retroactively if "it places 'certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe."' Id. at 306, 109 S. Ct. at 1073 (citing Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1180 (1971)). Second, under Teague a court should apply a new

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on direct appeal). Based on the combination of its holding in Griffith and Teague, supra, the Court has adopted the approach toward criminal retroactivity originally espoused by Justice Harlan. See Mackey v. United States, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting) See generally Richard H. Fallon & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733 (1991) (discussing history and developments leading to Court's adoption of Justice Harlan's approach).

procedural rule retroactively if "it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." Id. (citations and internal quotations omitted).

What makes Woods' appeal difficult is that Hughey does not fall neatly under either the substantive or procedural doctrinal category.[15] The facts of Davis present the paradigm of a case involving a new substantive criminal

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15. The Supreme Court has acknowledged that for retroactivity purposes, the substantive and procedural categories do not properly describe all new judicial decisions. In Robinson v. Neil, 409 U.S. 505, 93 S. Ct. 876 (1973), in which the Court first expressed the need to distinguish between substantive and procedural criminal law within retroactivity doctrine, the Court explained that "[w]e would not suggest that the distinction that we draw is an ironclad one the will invariably result in an easy classification of cases in one category or the other." Id. at 509, 93 S. Ct. at 878.

decision. In Davis, as in nearly all the decisions in which courts have retroactively applied a new substantive criminal decision, the defendant's conviction itself was potentially invalid due to an intervening change in law. See Davis, 417 U.S. at 346-7, 94 S. Ct. at 2305. In fact, most of the cases that have applied the Davis standard have addressed the retroactivity of the Supreme Court's decision in McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875 (1987), which invalidated the "intangible rights" theory of liability under the federal mail fraud statute, and have concluded that the McNally decision should be retrospectively applied. See United States v. Osser, 864 F.2d 1056 (3d Cir. 1989) (holding McNally retroactive); United States v. Mitchell, 867 F.2d 1232 (9th Cir. 1989) (same);

Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988) (same); United States v. Shelton, 848 F.2d 1485 (10th Cir. 1985) (same); United States v. Bonnette, 781 F.2d 357 (4th Cir. 1986) (same). But see United States v. Callanan, 671 F. Supp. 487 (E.D. Mich. 1987) (holding McNally non-retroactive). See also United States v. Sood, 969 F.2d 774 (9th Cir. 1992) (applying Davis analysis to decision that bribery statute only covered officials of states, not U.S. territories). In contrast to Davis and these post-McNally retroactivity decisions, there is no challenge to the validity of Woods' conviction under the mail fraud statute. 18 U.S.C. § 1341, and Hughey has in no way implied that Woods was convicted for acts that the mail fraud statute did not make criminal.

Yet Hughey's holding also cannot

readily be defined as a new rule of criminal procedure. In its retroactivity analysis the Court has treated as new rules of criminal procedure such developments as the application to the states of the Fourth Amendment exclusionary rule in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961), see Linkletter v. Walker, supra (holding Mapp v. Ohio non-retroactive), the prohibition on race-based peremptory challenges of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), see Allen v. Hardy, 478 U.S. 255, 106 S. Ct. 2878 (1986) (holding Batson non-retroactive on collateral review for convictions that became final before Batson was decided), and the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1772 (1966), see Johnson v. New Jersey, 384 U.S. 719, 733, 86 S. Ct. 1772 (1966)

(holding Miranda non-retroactive to trials that had occurred prior to the decision). In our view, Hughey's limitation on a district court's authority to order restitution bears little resemblance to what the Court has commonly characterized as a new criminal procedure rule for retroactivity purposes.

Rather than try to fit Hughey into a doctrinal mold to which it does not properly belong, we think the best approach is to recognize that Hughey is neither entirely substantive nor procedural, as those terms have typically been used in the retroactivity context, but rather falls somewhere in between the two. We further recognize that the two separate doctrinal standards that the Court has created for the retroactive application of new rules of substantive

and procedural criminal law are not at bottom, all that different.[16] Rather, there are common animating principles underlying the two. Inherent in both doctrinal formulations is the overarching notion that the interest in finality bears an important place in our legal system such that retroactivity is the exception, not the norm. Consequently, both the procedural and the substantive standards reflect the principle that new

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16. Teague recognizes an exception to its general rule of non-retroactivity when the decision in question "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 306, 109 S. Ct. at 1073 (citing Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1180 (1971)). In comparison, Davis, dictates that new substantive decisions will be retroactive only when the decisions correct "fundamental defect[s]" which, if left uncorrected, would result in a "complete miscarriage of justice" presenting "exceptional circumstances." Davis, 417 U.S. at 346, 94 S. Ct. at 2305. 16

decisions will not be retroactively applied without substantial justification. Conversely, both tests account for the fact that if holding a new decision non-retroactive would clearly result in an egregious injustice, the retroactivity is appropriate.

Arguably, this hybrid case lies on a continuum midway between the procedural and substantive standards. Consequently, the proper approach here might be to fashion for Hughey's retroactivity analysis a heightened Davis standard, i.e., one in which the defendant's burden of establishing that he has suffered a miscarriage of justice is greater than that in Davis, although not as difficult as that in Teague. However, rather than risk applying what may be a wooden or unduly formulaic approach, we will analyze Hughey's retroactivity with a

view toward the common animating principles underlying the two retroactivity doctrines. We believe this to be a sufficient basis upon which to decide this case.

D. Application of the Standard

While we recognize that $457,000 is a very large sum, and that Woods has been forced to disgorge it by what may now be considered an illegal order,[17] we find that Woods has not suffered the requisite miscarriage of justice. We reach this conclusion based upon a variety of

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17. As we discussed above, see supra, n.8, when analyzing the retroactivity of Hughey, we assume, without deciding, that Hughey, if retroactively applied to Woods, would invalidate that portion of the restitution order based on offenses for which Woods was not convicted.

factors.[18] First among these factors is

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18. Our conclusion that Hughey should not be retroactively applied should not imply that all new sentencing decisions should be held non-retroactive. We note that in addressing a Rule 35(a) motion, the court in United States v. Bermudez, 742 F.Supp. 556 (C.D. Cal. 1990), retroactively applied a new sentencing decision. The differences between the instant case and Bermudez reflect the varying considerations regarding the retroactivity of sentencing decisions that arise in different cases such that our decision today should not establish a general rule with respect to the retroactivity of new sentencing decisions.

In contrast to our approach here, the Bermudez court analyzed the sentencing decision as a new substantive rule, and hence has simply applied the Davis test. See id. at 558. Of course Bermudez involved a different issue from the issue we consider today. Specifically, in Bermudez the court held retroactive United States v. Chatman, 869 F.2d 525 (9th Cir. 1989), which determined that under the Armed Career Criminal Act, 18 U.S.C. § 922(e)(2)(B) ("ACCA"), the term "burglary" is limited to the common law definition of burglary. Under Chatman, therefore, defendants only receive sentence enhancements for burglaries that fall under the common law definition, which meant that the defendant in Bermudez had received unauthorized sentence enhancements, resulting in increased prison time, for

the effort made by the district court to ensure the accuracy of the restitution order along with the absence of any allegation by Woods that the money was not owed the Safeguard investors.

The district court took considerable steps to ensure that it ordered Woods to pay for the Safeguard investors only money that he owed them as a result of the fraudulent scheme he executed in conjunction with Pivorotto. In fact, Woods has not contested any of the district court's factual findings underlying its restitution order. See infra note 20. The court invested a substantial amount of time and attention

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two crimes which did not meet the common law definition. See Bermudez, 742 F.Supp. at 557. As we see it, that situation more closely resembles the situation in Davis than the instant case because in Bermudez the defendant received a sentence enhancement for an act that was not deemed a crime under the relevant common law provision.

in its review and evaluation of the financial statements filed by Woods and Pivorotto, as well as the Probation Office's report on their liability to the Safeguard investors.[19] At the lengthy sentencing hearing, the district court carefully reviewed the presentence report and heard testimony from three defense witnesses.[20]

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19. In order to compile its report, the Probation Office contacted the Safeguard investors and verified their claims against the company, in particular, their lost initial deposits entrusted to Safeguard.

20. The district court did not have the benefit of our decision in United States v. Palma, 760 F.2d 475 (3d Cir. 1985), which requires district courts to make specific findings about facts material to the imposition of criminal restitution under the VWPA. (Palma was filed several days after the district court conducted the sentencing hearing). The court nonetheless effectively complied with Palma's procedural safeguards. We note that Woods has never argued - either in the instant appeal or in his previous appeal to this court, see Woods I, 775 F.2d at 85-86 - that the district court failed to take adequate

The district court then made findings with respect to the total amount of the victim's losses, paying specific attention to the amount of deposits lost by the victims. The restitution order included only the investors' lost deposits and none of the lost interest. In formulating the restitution order, the court accounted for Woods' ability to pay and considered which assets Woods acquired as a result of his fraudulent activity. The high degree of care exercised by the court in its determination of the restitution order, as reflected, for example, in its decision not to require the repayment of any lost interest, further persuades us that Woods has not made the necessary showing that the restitution order was

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precautions in its fact finding during sentencing, including the safeguards required by Palma.

flawed by a fundamental defect.[21]

Even if the district court lacked authority under the FPA to order Woods to pay restitution to all of the defrauded Safeguard investors, Woods does not deny - nor does it appear that he could - that he was liable to the Safeguard investors for restitution that could have been enforced through a civil proceeding. Woods' underlying civil liability to the Safeguard investors further convinces us that by leaving his restitution payments to those investors undisturbed, we will not cause the type of miscarriage of

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21. We note that this lost interest is different from the pre-judgment interest on restitution awards which we have found unauthorized under the FPA in United States v. Sleight, 808 F.2d at 1020. The interest lost by the Safeguard investors represents the interest payments the investors would have received from the Safeguard Investment Company had their deposits actually been put toward the avowed purpose of Safeguard - the promotion of residential mortgage loans.

justice contemplated by Davis or the exceptions to Teague.

Moreover, that Woods was required to pay restitution rather than a fine is further indication that he has not suffered a complete miscarriage of justice for several reasons. First, as just discussed, the restitution order in question represents money that Woods owed the Safeguard investors as a result of a civil liability which Woods has not denied. This preexisting liability strongly detracts from Woods' claim that he has been subjected to a complete miscarriage of justice. Second, because the court ordered restitution, and not a fine, the government did not retain the money paid, but acted only as a conduit to pass the money along to the Safeguard

investors.[22] To now require the government to disgorge money it no longer has would create an unfairness in its own right that we cannot discount in our analysis. Third, while the issue is quite complicated, and need not be decided here, it seems highly unlikely that Woods could recover his restitution payments from either the government, whose hands the money merely passed through, or the victims themselves, who were entitled to the funds.[23]

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22. The sole exception is the $23,000 of undisbursed funds belonging to Safeguard Investors that the Probation Office has been unable to locate, see supra n.3.

23. Resolution of this question would implicate the doctrine of sovereign immunity, including the jurisdictional limitations of the Tucker Act, 28 U.S.C.A. § 1346(a) (West Supp. 1992).

We note that Woods would face a number of obstacles before establishing his right to recover from the government under the Tucker Act. For example, the Tucker Act restricts recoveries against

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the government to $10,000 in actions brought in federal district court, see 28 U.S.C.A. § 1346 (a)(2) (West Supp. 1992), and Woods has requested repayment of over $400,000. Moreover, Woods must establish that the allegedly violated statute, here the FPA, expressly or implicitly contemplates the government's repayment of wrongfully ordered restitution. See United States v. Mitchell, 463 U.S. 206, 216-17 & n.16, 103 S.Ct. 2961, 2967-8 & n.16 (1983) (holding that the Tucker Act provides the United States' consent to suit for claims founded on statutes or regulations that expressly or implicitly create substantive rights to money damages). In addition, in order to recover under the Tucker Act, Woods must establish that the relief he seeks constitutes money damages. See id. at 216, 103 S.Ct. at 2968 ("The claim must be one for money damages."); Bowen v. Massachusetts, 487 U.S. 879, 905, 108 S.Ct. 2722, 2737 (1988); United States v. Kras, 409 U.S. 464, 465, 93 S.Ct. 629, 630-31 (1973) ("the [Tucker] Act has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States"); 14 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3657, at 279 (1985), But see United States v. Neely, 546 F.2d 1059, 1064 (3d Cir. 1976) (upholding Tucker Act jurisdiction over civil class action to recover wrongfully paid fines without discussing whether repayment of fines constituted money damages or equitable relief).

In concluding that Woods has not demonstrated that the restitution order resulted in the type of miscarriage of justice contemplated by Teague or Davis, we have placed considerable weight upon the improbability of Woods' ability to recover the money in conjunction with the fact that Woods claims to have been wrongfully deprived not of his liberty, but of his money, to which he had a doubtful claim under the circumstances. As we recognized in United States v. Pollak, 844 F.2d 145 (3d Cir. 1988), criminal restitution "is imposed as part of sentencing and remains inherently a criminal penalty.'" Id at 153 (citing United States v. Sleight, 808 F.2d 1012, 1020 (3d Cir. 1987));[24] See also United

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24. We acknowledge that under the FPA, courts imposed restitution as a condition of probation, which was technically considered a suspension of the sentence, rather than as an actual

States v. Brown, 744 F.2d 905, 909-910 (2d Cir. 1984) (discussing differences between criminally- and civilly imposed restitution). Yet restitution cannot, for that reason alone, be considered the same as incarceration for retroactivity purposes. If Woods were still incarcerated, and if Hughey called into question the validity of his imprisonment, that scenario would present us with far stronger considerations in favor of retroactive relief. When liberty is not at stake, the reasons to apply a new decision retroactively, and hence to bend the usual rules of finality, are not necessarily lacking, but are more likely

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part of the sentence itself. See 18 U.S.C. § 3651 (repealed as of Nov. 1, 1987) ("[a court] may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such . . . conditions as the court deems best").

to be missing. See United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988).

On a related note. even though we have recognized that restitution can be imposed as a criminal penalty, we have also acknowledged its marked similarity to a civil judgment. As we stated in United States v. Kress, 944 F.2d 155 (3d Cir 1991), "when reduced to a judgment, restitution 'does not differ in essence from a judgment arising out of civil proceedings.' In other words, we view[] a judgment of restitution as a debt to a victim." Id at 160 (citing Sleight, 808 F.2d at 1020). Although there are obvious procedural differences between the creation and enforcement of civil and criminal restitutionary liabilities, a restitutionary obligation, whether civil or criminal, represents essentially the same outcome: a financial debt owed by

the defendant.

If as a result of a civil judgment Woods has paid restitution to the Safeguard investors and a subsequent judicial decision has cast serious doubt on the validity of that judgment, Woods would not be able to disturb it. Under Rule 60(b), Fed R. Civ. P.. the general rule is that a civil judgment, once final, will not be reopened because of a change in the law. See generally 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2864, at 223 (1973 & 1992 Supp.) (Stating this general rule and collecting cases). But see Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989) (allowing the reopening of a civil judgment after a change in law). Given the similarity between Woods' restitution order and a civil judgment, combined with

the general rule of non-retroactivity for civil judgments, we find additional grounds for holding that Woods has not established that he would suffer a complete miscarriage of justice because of Hughey's non-retroactivity. In other words, Woods faces no more injustice than civil defendants who cannot reopen judgments they have been forced to pay despite an intervening change in the law.[25]

As we have mentioned above, we are not presented with a situation, as in Davis, supra, or Osser, supra, in which there is any question about the legality of the defendant's conviction. As we acknowledged in Osser, when a defendant

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25. While not a basis for our decision, we have little doubt that had the district court believed it was unable to impose a larger restitutionary condition on its sentence, it would have fixed a longer jail term.

has been convicted of acts that do not lawfully constitute a crime, that situation typifies what is meant by a "complete miscarriage of justice" such that "[n]o circumstances call more for the invocation of a rule of complete retroactivity." 864 F.2d at 1058 (citing United States v. United States Coin & Currency, 401 U.S. 715, 724, 91 S. Ct. 1041, 1046 (1971)).

Finally we find in Osser further support for our decision to deny Woods the relief he requests. As we have already noted. Woods asks for relief after having completed all facets of his sentence. His appeal, therefore, raises issues very similar to those implicated by coram nobis, which a defendant can only utilize after he or she is no longer in custody. In Osser, we denied a request for a writ of coram nobis by a

former City Commissioner of Philadelphia who, though no longer incarcerated, sought to vacate his conviction for mail fraud in an effort to recover his city pension. The district court had instructed the jury that it could find Osser guilty of mail fraud if, among other things, it found his acts resulted in the deprivation of the "intangible right" of honest government. Based on the Supreme Court's invalidation of the "intangible rights" theory in McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875 (1987). Osser sought coram nobis relief.

In our decision to deny Osser coram nobis relief because of his failure to challenge the intangible rights theory on direct appeal, we set forth additional considerations, relevant here, that influenced that decision. Specifically,

we noted our legal system's heightened interest in finality after a sentence has been served. See 864 F.2d at 1059 ("The interest in finality of judgments is a weighty one that may not be casually disregarded. Where sentences have been served, the finality concept is of an overriding nature . . ."). We similarly recognized that when a defendant has served a prison sentence and "nothing remains but some financial detriment," there is diminished justification for reopening a defendant's case. Id. at 1060. We are more willing to expend scarce judicial resources - which, of course, is what retroactivity entails- on those defendants that come before us because of an ongoing or potential loss of liberty, than on those who, like Woods, seek the retroactive application of a new decision in order to recoup lost

money. We emphasize that we find this latter consideration particularly compelling when as here, the lost money was paid to satisfy a pre-existing civil restitutionary obligation and the government, from whom the defendant seeks repayment of the money, did not retain the funds.

In sum, we hold that Hughey should not be retroactively applied to Woods in his Rule 35(a) motion and that the district court's restitution order should, therefore, remain undisturbed.

The order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3207

UNITED STATES OF AMERICA,

Appellee

v.

ANTHONY J. PIVOROTTO
JOHN ROBERT WOODS,

JOHN ROBERT WOODS,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. CRIMINAL NO. 84-00184)

Argued: October 27, 1992

Before BECKER, NYGAARD and
HIGGINBOTHAM, Circuit Judges.

(Filed: February 22, 1993)

JUDGMENT

This cause came to be heard on the record from the United States District

Court for the Western District of Pennsylvania and was argued by counsel October 27, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 1, 1992 be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST

Clerk

Dated: February 22, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3207

UNITED STATES OF AMERICA,

Appellee

v.

ANTHONY J. PIVOROTTO
JOHN ROBERT WOODS,

JOHN ROBERT WOODS,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. CRIMINAL NO. 84-00184)

**SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC**

Present: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and LEWIS, Circuit Judges.

The petition for rehearing filed by Appellant, having been submitted to the

judges who particiapted in the decision of this Court* and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

Circuit Judge

DATED: March 23, 1993

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*. Judge Leon A. Higginbotham participated in the decision, but retired from the bench on March 6, 1993, hence he did not consider the Petition for Panel Rehearing.